1990

Sandy City, a municipal corporation v. Salt Lake County, a political subdivision of the State of Utah, Salt Lake County Planning Commission, K. Delyn Yeates, R. Scott Priest, W. Scott Kjar, Steven E. Smott, Posteroblecker, Inc. and Chevron U.S.A., Inc. : Brief in Opposition to Certiorari

Utah Supreme Court

Walter R. Miller; Sandy City Attorney; Attorney for Appellant.
David E. Yocom; Salt Lake County Attorney; Kent S. Lewis; Deputy County Attorney; Attorneys for Appellees Salt Lake County and Salt Lake County Planning Commission.

UTAH SUPREME COURT

BRIEF

IN THE SUPREME COURT OF THE STATE OF UTAH

SANDY CITY, a municipal corporation, Plaintiff and Appellant, -vs- SALT LAKE COUNTY, a political subdivision of the State of Utah, SALT LAKE COUNTY PLANNING COMMISSION, K. DELYN YEATES, R. SCOTT PRIEST, W. SCOTT KJAR, STEVEN E. SMOOT, POSTERO-BLECKER, INC. and CHEVRON U.S.A., INC., Defendants and Appellees.	CASE NO. 900425 ARGUMENT PRIORITY CLASSIFICATION 16

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

REVIEW OF A DECISION OF THE UTAH COURT OF APPEALS AFFIRMING DISMISSAL OF THIS ACTION BY THE THIRD DISTRICT COURT

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[R1078]

JURISDICTION OF THE COURT

This is the brief of Salt Lake County opposing a petition for certiorari filed by Sandy City, which seeks a review of a decision of the Utah Court of Appeals entered on June 7, 1990. The Court of Appeals affirmed a decision by the Third District Court dismissing this action brought by Sandy City. Rehearing of the matter was denied by the Court of Appeals on August 6, 1990. The Supreme Court has discretionary jurisdiction to review this matter pursuant to Utah Code Ann. 78-2-2(5) and Rule 46 of the Utah Rules of Appellate Procedure.

CONTROLLING STATUTES

The controlling statutes in this case are Utah Code Ann. 10-1-104(11) and Utah Code Ann. 10-2-418, which read as follows:

10-1-104(11):

> "Urban development" means a housing subdivision involving more than 15 residential units with an average of less than one acre per residential unit or a commercial or industrial development for which cost projections exceed $750,000 for any or all phases.

10-2-418:

> Urban development shall not be approved or permitted within one-half mile of a municipality in the unincorporated territory which the municipality has proposed for municipal expansion in its policy declaration, if a municipality is willing to annex the territory proposed for such development under the standards and requirements set

> forth in this chapter; provided, however, that a property owner desiring to develop or improve property within the said one-half mile area may notify the municipality in writing of said desire and identify with particularity all legal and factual barriers preventing an annexation to the municipality. At the end of 12 consecutive months from the filing with the municipality of said notice and after a good faith and diligent effort by said property owner to annex, said property owner may develop as otherwise permitted by law. Urban development beyond one-half mile of a municipality may be restricted or an impact statement required when agreed to in an interlocal agreement, under the provisions of the Interlocal Co-operation Act.

QUESTIONS PRESENTED FOR REVIEW

This case presents the question as to whether there are any special or important reasons, as set forth in Rule 46 of the Utah Rules of Appellate Procedure, to justify Supreme Court review of the decision of the Court of Appeals.

STATEMENT OF THE CASE

I. NATURE OF THE CASE.

In November of 1987, Sandy City (Sandy) filed a complaint in the Third District Court seeking an extraordinary writ and declaratory and injunctive relief to void the approval by Salt Lake County (County) in October of 1987 of a conditional use permit for a Chevron station on 0.7 acres of land located at 10600 South and 1300 East in the unincorporated area of the county commonly referred to as "White City." R. 2-34. The

complaint also sought to void an earlier decision by the Board of County Commissioners made in August of 1987 to rezone 4.18 acres of property which includes the Chevron parcel.

Defendants included Salt Lake County and the Salt Lake County Planning Commission, Chevron, Postero-Blecker, Inc., Yeates, Priest, Kjar and Smoot. Chevron is the developer of the station at issue. Postero-Blecker acted as Chevron's agent in the land acquisition. Defendants Yeates, Priest, Kjar and Smoot were the owners of the larger parcel.

Motions for summary judgment were filed by all defendants in January of 1988. R. 75, 125, 155. Sandy filed a cross-motion for summary judgment and a motion to strike affidavits and certain other documents filed by Chevron. R. 173. The certified administrative record was filed with the District Court in accordance with an order requiring certification entered on March 3, 1988. R. 255.[1]

In March of 1988, the District Court granted defendants' motions for summary judgment and denied Sandy's motion for summary judgment and motion to strike. R. 259. Appendix Exhibit C. On April 8, 1988, the District Court entered its order of judgment and dismissal. R. 265. Appendix Exhibit D.

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1. The certified administrative record is contained in envelopes 1 through 6 of the court record. Each envelope contains a numbered index of the documents within the envelope. The Chevron record is in envelopes 3 and 4. The McDonald's record is in envelopes 1 and 2, and the zoning of the original parcel is in envelopes 5 and 6.

On June 7, 1990, the Utah Court of Appeals affirmed the District Court judgment. Appendix Exhibit A. Sandy's petition for a rehearing was denied on August 6, 1990. Appendix Exhibit B.

II. STATEMENT OF UNDISPUTED FACTS.

1. On April 5, 1987, defendant Yeates applied with Salt Lake County to have the original parcel of 4.18 acres rezoned from Residential R-1-8 to Residential RM-ZC[2] and Commercial C-2.

2. The Salt Lake County Planning Commission, after hearing the matter, recommended to the Board of County Commissioners of Salt Lake County that the application be approved. After hearing the matter, the Board of County Commissioners approved the rezoning application on August 5, 1987. R. 102.

3. Sandy City failed to appear at the rezoning hearing before the County Commission and failed to take any court action challenging the rezoning decision until after the subsequent conditional use permit was approved.

4. On August 16, 1987, Postero-Blecker, as agent for Chevron, applied with Salt Lake County for a conditional use permit to build a Chevron station on 0.7 acres of the original parcel. R. 20.

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2. The ZC designation attached certain conditions limiting the height of buildings and the nature of uses that could be developed on the original property. R. 18.

5. The County Planning Commission heard the matter on September 22, 1987, at which time evidence was presented concerning the application. R. 107-111. Sandy appeared and objected to the development. The matter was continued by the County Planning Commission until October 13, 1987, at which time the application was approved after additional evidence was presented. R. 112-115.

6. Oral evidence presented at the County Planning Commission hearings included the following:

a. Recommendations in favor of the application by residents in the area. R. 110, 111.

b. Testimony by representatives of Chevron of a need for the service in the area. R. 113.

c. Recommendations for preliminary approval by the Planning staff subject to certain conditions. R. 108.

d. Testimony in support of the application from the White City Community Council and from the United Association of Community Councils. R. 110.

e. Testimony from Chevron officials estimating the costs of the project as $175,000.00. R. 108.

7. On October 21, 1987, the Board of County Commissioners upheld the Planning Commission decision approving the conditional use permit by denying the appeal of Sandy City. Envelope 3, Document 4.

8. The Chevron station, including the underlying land, is owned and operated separately from all other development on

the northwest corner of 10600 South and 1300 East, and all permits were obtained separately from any other development. R. 180.

9. On December 9, 1987, the Salt Lake County Commission upheld the decision of the Planning Commission approving a McDonald's restaurant on 1.3 acres of land located within the original parcel of 4.18 acres. On June 13, 1988, Sandy filed an action against Salt Lake County and McDonald's raising most of the same issues it raises herein. Sandy has appealed to the Supreme Court an adverse ruling from the District Court in that case. The briefs have been filed by the parties and the case is awaiting oral argument.[3]

ARGUMENT

POINT I

INTRODUCTION

Rule 46 of the Utah Rules of Appellate Procedure states that certiorari will be granted only for special and important reasons. The rule lists the character of reasons which are considered special or important. This case, as the remainder of this brief will demonstrate, does not fit within any of the reasons listed in Rule 46 or within any other similar reasons. In addition, many of the issues in this case are now moot since

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3. Sandy City v. Salt Lake County, et al., Case No. 890211.

all defendants except Salt Lake County have settled with Sandy and have been dismissed from the suit.

POINT II

SANDY'S ARGUMENTS CONCERNING ANNEXATION POLICY ARE MISLEADING AND UNRELATED TO THE ISSUES IN THIS CASE.

A. SANDY'S ERRATIC BOUNDARIES ARE NOT RELATED TO THE ISSUES IN THIS CASE.

Sandy argues that its erratic boundaries, as shown on the map in its petition, are a result of urban development in the unincorporated area of the county. Nothing could be further from the truth. The configuration of Sandy boundaries has been determined by Sandy, not the County. The erratic Sandy boundaries and islands of unincorporated area within Sandy[4] are a result of gerrymandered annexations by Sandy which have excluded unincorporated islands where a majority of the property owners refused to annex or where Sandy has reached for properties with high sales and property tax base. Sandy's erratic boundaries have no relationship to the issues in this case.

Service districts are also blamed by Sandy for its boundary problems. No service district is a party to this case

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4. Prior to the 1975 enactment of former Section 10-3-2, there was no prohibition against the creation of unincorporated islands as a result of annexations. The prohibition against creation of unincorporated islands through annexation is now found in Utah Code Ann. 10-2-417.

and service districts are not on trial here. Whether or not service districts are beneficial or detrimental to citizens also has nothing to do with the issues in this case.

B. THIS IS NOT AN ANNEXATION CASE.

Sandy treats this case as an annexation case by arguing annexation policy in its petition as justification for review by the Supreme Court. However, this is not an annexation case and legislative policy does not support Sandy's position in any event.

The argument that the legislature intended that urbanized areas should be within cities is true only in unincorporated areas where a high quality of urban services are needed. Utah Code Ann. 10-2-401(3).[5] Obviously, Chevron did not need any Sandy services since it chose not to annex at the time of development.

Utah laws governing annexation require that annexations be drawn along logical geographic boundaries. Utah Code Ann. 10-2-414. The annexation act also requires that decisions about municipal boundaries and urban development need to be made with adequate consideration of the effect of the proposed actions on adjacent areas and the interest of other

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5. Contrary to statements in Sandy's petition, counties have been granted powers almost identical to cities' to provide and separately fund urban-type services. Utah Code Ann. 17-5-1 through 17-5-88 (Powers and Authorities of Counties); Utah Code Ann. 17-34-1 through 17-34-5 (Municipal Services to Unincorporated Areas); Utah Code Ann. 10-8-1 through 10-8-89 (Powers and Authorities of Cities).

governmental entities. Utah Code Ann. 10-2-401(6). If Sandy annexed this property, it would carve out almost the only commercial development within the large unincorporated residential area of White City. R. 339.

The point is, legislative policy with regard to the meaning of Utah Code Ann. 10-2-418 does not in any way dictate that this small development should be within Sandy City. Therefore, Sandy's arguments concerning legislative policy are not justification for this Court to grant certiorari review of the matter.

POINT III

THE UTAH COURT OF APPEALS APPLIED THE CORRECT STANDARD OF REVIEW IN THIS CASE.

The complaint in this case alleged that the rezoning and conditional use approval by the County of the Chevron property were contrary to the County's zoning ordinance and master plan. These allegations were in addition to and separate from the allegations concerning the meaning of Utah Code Ann. 10-2-418.

The Utah Supreme Court has held in numerous cases[6] that courts will not interfere with zoning decisions as long as

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6. Marshall v. Salt Lake City, 105 U. 111, 141 P.2d 704 (Ut. 1943); Dowse v. Salt Lake City Corporation, 123 U. 107, 255 P.2d 723 (Ut. 1953); Crestview-Holladay Homeowners Assn., Inc. v. Engh Floral Company, 545 P.2d 1150 (Ut. 1976); Gayland v. Salt Lake County, 11 U.2d 307, 358 P.2d 633 (Ut. 1961).

there is a reasonable basis for the decision. The Court of Appeals applied this standard in its review of the merits of the zoning decision and the findings of the Planning Commission for the conditional use application. Issues concerning the interpretation of the master plan, the impact of development on the area, and the need for development were properly considered by the Planning Commission and the County Commission and the Court of Appeals correctly held that the record supported the County's decision concerning such matters.

Sandy attempts to argue that this standard should not have been applied because of the issues concerning the meaning of Utah Code Ann. 10-2-418. This argument has no merit since the Court of Appeals did not apply this standard to its review of such issues. In fact, the Court of Appeals declined to decide issues concerning the meaning of 10-2-418, having affirmed the District Court on other grounds.

POINT IV

THE RECORD SUPPORTS THE CONCLUSION OF THE COURT OF APPEALS THAT SANDY FAILED TO OBJECT TO THE REZONING IN A TIMELY MANNER.

A. NOTICE OF THE REZONING HEARING MET ALL LEGAL REQUIREMENTS.

Sandy attempts to excuse its failure to appear at the zoning hearing for this property by arguing that it did not receive adequate notice of the hearing. Notice of the hearing was published in the newspaper as required by Utah Code Ann.

17-27-14. Envelope 5, Document 2. In addition, notice was posted at the County Government Center, the Whitmore Library, and on a telephone pole near the property. Envelope 5, Document 3. County staff asked Sandy for a recommendation on the rezoning application, to which Sandy replied. Envelope 6, Document 2, p. 4; R. 248 Comments of Mike Coulam. Therefore, Sandy had both actual and constructive notice that the County was in the process of rezoning the property. A representative of Sandy admitted during the conditional use hearing for the Chevron station that Sandy failed to attend the Planning Commission and County Commission hearings on the rezoning application. No claim was made that it was due to lack of notice. R. 109 Comments of Mike Coulam.

B. SANDY HAD THE OPPORTUNITY TO RAISE ISSUES CONCERNING URBAN DEVELOPMENT DURING THE REZONING PROCESS.

In its petition, Sandy claims that there was no "specific use" for the property at the time of the rezoning process and therefore issues concerning Utah Code Ann. 10-2-418 could not have been addressed. It is ironic that Sandy now takes this position because Sandy argued in its reply brief to the Court of Appeals that the entire development was laid out during the zoning process.[7] Issues concerning the applicability of Utah Code Ann. 10-2-418 were well known to Sandy at the time of the

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7. "The property owner's entire development was laid out and presented to the County at the time that the commercial zoning was requested." Sandy Reply Brief, p. 12.

rezoning process and were raised by Sandy in its letter seeking to have the zoning reconsidered by the Board of County Commissioners. R. 23. This record supports the Court of Appeals' determination that Sandy could have raised the urban development issues during the zoning process.

Sandy also claims that the County entered into an agreement or understanding with Sandy that legal issues concerning Utah Code Ann. 10-2-418 would be addressed at the conditional use hearing. The record does not support Sandy's contention. The Board of County Commissioners refused to rehear the application for rezoning since the rezoning had already been approved and the ordinance enacted and published. Envelope 5, Document 6. It referred Sandy to the Planning Commission because the conditional use application for the Chevron station was pending before the Planning Commission at that time. This comment can hardly be construed as an agreement between the parties as to where jurisdiction lay for review of issues concerning Utah Code Ann. 10-2-418. In any event, jurisdiction of a court or administrative body over a subject matter is not subject to a stipulation or agreement by the parties. State Department of Social Services v. Higgs, 656 P.2d 998 (Ut. 1982); Bailey v. Sound Lab, Inc., 694 P.2d 1043 (Ut. 1984); Springville Community District v. Iowa Dept. of Public Instruction, 109 N.W.2d 213 (Io. 1961); see also 2 Am.Jur.2d Administrative Law §152.

C. SANDY HAD THE OPPORTUNITY TO HAVE THE REZONING DECISION REVIEWED IN COURT.

Sandy argues certain zoning enabling statutes referenced in the opinion of the Court of Appeals are not applicable to this case. Whether those zoning statutes are all applicable to this specific fact situation makes no difference in regard to judicial review of the zoning decision. The point is that Sandy had the opportunity for judicial review of the rezoning decision and failed to take that opportunity. A declaratory judgment pursuant to Utah Code Ann. 78-33-2 is an appropriate action to review rezoning decisions and also to seek an interpretation of statutory provisions.[8] Injunctive actions brought under Rule 65A of the Utah Rules of Civil Procedure have been used to test the validity of zoning amendments.[9] Actions brought under Rule 65B of the Utah Rules of Civil Procedure for writs in the nature of certiorari to the district court may also be used to test the validity of zoning decisions. Sandy failed to avail itself of any of the above remedies to have the rezoning reviewed in court in a timely manner.

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8. Naylor v. Salt Lake City Corp., 17 U.2d 300, 410 P.2d 764 (Ut. 1966); Phi Kappa Iota Fraternity v. Salt Lake City, 116 U. 536, 212 P.2d 177 (Ut. 1949).

9. Marshall v. Salt Lake City, supra.

POINT V

SANDY'S POSITION CONCERNING THE MEANING OF UTAH CODE ANN. 10-2-418 IS UNTENABLE AND NEEDS NO FURTHER REVIEW.

The statement is made several times by Sandy in its petition that the estimated cost of the Chevron development exceeded $750,000.00.[10] What Sandy doesn't make clear is the basis for this statement. Sandy's appraisal for the cost of the Chevron development included the estimated cost of land, fixtures, equipment and furnishings.[11] The cost of land has no relationship to the impact of a development and would vary greatly depending on when the current developer purchased the land. If the land had been owned by the developer for a long period of time, the cost likely would be much less than the cost of the same piece of land purchased recently. Often the developer leases the land and there is no actual purchase cost or the proposed development may involve an expansion of an existing development not involving additional land. Thus, if land cost is included in determining cost projections, the result would be arbitrary depending on the date and the nature of the land transaction and the nature of the development.

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10. Sandy Petition, p. 11.

11. Sandy's appraisal estimates the Chevron development to cost between $660,000.00 and $760,000.00, including land costs of $210,000.00. The appraisal includes the cost of fixtures, equipment and furnishings. R. 133.

Also, it is not reasonable to believe the legislature intended that the County speculate on what kind of internal fixtures, equipment and furnishings will end up in an office or commercial development at the time it has to decide whether or not to issue permits. In most cases, this would not even be possible. In many situations where the County reviews an application for an office building or commercial development, the owner does not have any or all of his specific tenants in mind. How offices or commercial developments will be furnished and equipped is later decided by each tenant after the building has been approved and constructed and the offices leased. Often such furnishing and equipment later change as tenants change. In most cases, it would be pure speculation for the County to attempt to estimate such costs.

Finally, these issues are not broad issues upon which the future integrity of cities depends, as Sandy argues. The majority of commercial and industrial developments cost more than $750,000.00 regardless of how the cost issues in this case are resolved.

POINT VI

MANY OF THE ISSUES IN THIS CASE ARE NOW MOOT.

Sandy, in the prayer of its complaint, asks for a judgment declaring the actions of the County approving the Chevron development illegal, for an injunction enjoining the

issuance of building permits, for an injunction requiring removal of improvements or compliance with annexation laws and for funds paid to the County because of this development.[12] On October 3, 1990, all defendants except Salt Lake County and the Salt Lake County Planning Commission were dismissed from this suit based upon a stipulation that the issues were moot with respect to those defendants. The settlement agreement requires that Chevron initiate proceedings to have the property in question annexed to Sandy.[13]

Since the Chevron gas station is already constructed and Chevron has agreed to annex to Sandy, the only issues remaining in the lawsuit are Sandy's claim for damages and the prayer for declaratory judgment concerning the legal issues in the case.

The claim for damages is totally without merit. Assuming, arguendo, that the County misconstrued the law in approving the Chevron development, Sandy suffers no compensable damages from the act. If the County had denied the development, it is totally speculative as to whether the property owners would have annexed to Sandy or proposed an alternative development in the County. Even if the owners of the Chevron property would have annexed the property in

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12. A copy of the prayer from Sandy's Complaint is attached as Appendix Exhibit E.

13. Copies of the Stipulation and Order of Dismissal and the Affidavit of Leonard J. Lewis, counsel for Chevron, attached to Suggestion of Mootness filed by Salt Lake County are included as Appendix Exhibit F.

question to Sandy, Sandy cannot claim that it would have approved this development and benefited from the fees and tax revenues since it opposed the development, claiming that the proposed development was contrary to the Sandy Master Plan.[14]

Actually, Sandy will receive an undeserved windfall by annexing the Chevron property now. It will receive future taxes on a development it would not have approved and one where the County provided all the expenses of building inspection and other required development reviews.

The declaratory judgment action also is no longer appropriate since Chevron has now agreed to annex to Sandy City. The Supreme Court has consistently held that declaratory judgment is subject to the requirement of justiciability including the defense of mootness. Merhish v. Folsom & Associates, 646 P.2d 731 (Ut. 1982); Hall v. Fitzgerald, 671 P.2d 224 (Ut. 1983); Backman v. Salt Lake County, 13 U.2d 412, 375 P.2d 756 (Ut. 1962); Hoyle v. Monson, 606 P.2d 240 (Ut. 1980).

The only exception to the rule is for matters that are likely to reoccur which have a wide public concern and would otherwise escape judicial review. Merhish v. Folsom, supra.

Many of the legal issues raised by Sandy in this case have been argued and briefed solely by Chevron, and not by the

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14. Testimony of Mike Coulam, Director of Community Development of Sandy and Michael Tingey, Chairman of the Sandy City Planning Commission, Minutes of County Planning Commission for September 22, 1987. R. 107-111.

County. These issues include Sandy's Motion to Strike Affidavits of Chevron and the issue of willingness to annex under Utah Code Ann. 10-2-418.[15] It is unclear whether the County could even take a position on these issues at this stage of the proceedings.

Finally, this is not a case of wide public concern or one where the issues concerning Utah Code Ann. 10-2-418 will escape judicial review. In fact, the issues concerning the meaning of that statute are already before the Supreme Court in the case of Sandy City v. McDonald's, No. 890211[16], and therefore there is no legitimate reason to continue this litigation.

CONCLUSION

The issues in this case have been reviewed by the County Planning Commission, the County Commission, the District Court, and the Court of Appeals. The Court of Appeals also reviewed each issue now raised by Sandy in its review of Sandy's petition for rehearing.

There is no conflict between the Court of Appeals' decision in this case and any other Court of Appeals decision or any decision by the Supreme Court which would justify further review of this case. The issues in this case

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15. These issues are addressed in the Court of Appeals decision on pages 41-44.

16. The District Court Order in Sandy City v. Salt Lake County, et al., No. 890211 (McDonald's), is attached as Appendix Exhibit G.

Sandy failed to raise issues concerning the meaning of Utah Code Ann. 10-2-418 in a timely manner during the rezoning hearing. In addition, many of those issues are now moot. Sandy has cited no special and important reasons which would justify yet another review of the issues in this case.

For these reasons Salt Lake County asks that Sandy's petition for a writ of certiorari be denied.

DATED this 18 day of October, 1990.

DAVID E. YOCOM
Salt Lake County Attorney

By Kent S. Lewis
KENT S. LEWIS
Deputy County Attorney
Attorneys for Appellees Salt Lake County and Salt Lake County Planning Commission

R1070

MAILING CERTIFICATE

I hereby certify that I caused four copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari to be mailed, postage prepaid, this 17 day of October, 1990, to the following:

Walter R. Miller
Sandy City Attorney
440 East 8680 South
Sandy, Utah 84070
Attorney for Appellant

[R1070]

APPENDIX

Cite as
136 Utah Adv. Rep. 38

IN THE UTAH COURT OF APPEALS

SANDY CITY, a municipal corporation, Plaintiff and Appellant,
v.
SALT LAKE COUNTY, a political subdivision of the State of Utah; Salt Lake County Planning Commission; K. Delyn Yeates; R. Scott Priest; W. Scott Kjar; Steven E. Smoot; Postero-Blecker, Inc.; and Chevron U.S.A., Inc., Defendants and Appellees.

No. 880429-CA
FILED: June 7, 1990

Third District, Salt Lake County
Honorable Raymond S. Uno

ATTORNEYS:

Walter R. Miller, Sandy, for Appellant

Brinton R. Burbidge, Salt Lake City, for Appellees

Yeates, Priest, Kjar, Smoot and Postero-Blecker,Inc. Leonard J. Lewis, Salt Lake City, for Appellee Chevron U.S.A., Inc.

Kent S. Lewis, Salt Lake City, for Appellee Salt Lake County

Before Judges Bench, Garff, and Jackson.

OPINION

GARFF, Judge:

Plaintiff Sandy City appeals the trial court's dismissal of its action against defendants Salt Lake County, property owners Yeates, Priest, Kjar, and Smoot, and developers Postero-Blecker, Inc. (Postero-Blecker) and Chevron USA, Inc. (Chevron). We affirm the trial court's dismissal of Sandy City's action.

This action involves a 4.18-acre parcel of commercial property located on the northwest corner of 10600 South and 1300 East in unincorporated Salt Lake County. The property abuts Sandy City's boundaries and is located within an unincorporated "island" within Sandy City's limits. Since 1976, the county master plan and Sandy City plans have called for rural residential uses of the property.

In 1979, Sandy City adopted a general annexation policy declaration which, among other things, delineated twenty-one unincorporated islands within the city boundaries which Sandy City was willing to annex, including the present parcel. According to Sandy City, this policy declaration requires property owners to first attempt to annex to Sandy City, thereby obviating the County's approval for development of commercial property when the development cost is in excess of $750,000.

On August 5, 1987, at the property owne request, the Salt Lake County Commissic without amending its master plan, adopted zoning ordinance which permitted commerc development on the present property. San City objected to the rezoning but failed appeal the decision.[1]

On August 26, 1987, Postero-Blecker, t agent for the property owners and Chevrc applied to Salt Lake County for a conditior use permit to build a Chevron service static car wash, and mini-convenience store on acres of the property. This application ind ated that the estimated value of the proj was $250,000. The property owners also in nded to build a McDonald's restaurant on t property. On September 30, 1987, they fil another conditional use permit applicati which valued the McDonald's project approximately $300,000. The property owne did not petition to annex the property Sandy City.

On September 18, 1987, Sandy City pro sted the Chevron application, indicating th "Sandy City is currently considering annex tion of the property and the annexation w require an independent consideration proper zoning for this property." It also ur uccessfully petitioned the Salt Lake Coun Commission to reconsider and amend its pr viously passed zoning ordinance.

On October 13, 1987, the Salt Lake Coun Planning Commission approved the Chevr conditional use application. On October 1 1987, Sandy City appealed this decision. T Salt Lake County Planning Commission, fc lowing several public hearings, denied San City's appeal and entered findings of fact.

Sandy City then appealed the condition use decision to the Salt Lake County Comr ission, which held a hearing on December 1987. The Salt Lake County Commissic affirmed the Salt Lake County Plannir Commission's grant of the Chevron condi onal use permit, finding that the require statutory procedure had been followed ar that the grant of the conditional use perm was in the community's interest. Sandy Ci then brought this action in the district court.

On January 18, 1988, Salt Lake Coun filed with the district court the affidavit c Helen Christiansen, the Salt Lake Plannir Commission's administrative assistant, ar the minutes of the Salt Lake County Plannir Commission's September 22 and October 1 1987 meetings, at which Chevron's condition use permit application had been discussed ar interested parties had presented evidenc Subsequently, Sandy City submitted an aff davit indicating that the projected cost of th Chevron development was between $660,0(to $760,000, and that the cost of the McD(nald's development would be betwee $900,000 and $1,100,000. Simultaneously, Sa

Lake County submitted the minutes of the April 28, 1987 meeting of the Salt Lake County Planning Commission, which involved discussion of the zoning change, along with Helen Christiansen's authenticating affidavit. All parties moved for summary judgment.

Sandy City then moved to strike Salt Lake County's affidavits, alleging that they failed to conform to the requirements of rule 56(e) of the Utah Rules of Civil Procedure. Chevron responded by filing an affidavit indicating that the building value of the proposed Chevron station was $175,000.

On February 4, 1988, the day before the hearing on Salt Lake County's motion for summary judgment, Sandy City's attorney moved for additional discovery time pursuant to rule 56(f) of the Utah Rules of Civil Procedure.

During the hearing on February 5, 1988, Salt Lake County requested permission to introduce into evidence the certified record of the administrative hearings. These records included the previously submitted commission minutes, with additional maps and supporting materials. Sandy City's counsel objected, stating that he did not know what the administrative record contained and, thus, the record was prejudicial. The district court overruled Sandy City's objection and allowed the record to be entered into evidence. On February 19, 1988, Salt Lake County submitted the minutes of the December 9, 1987 meeting of the Salt Lake County Commission, containing the appeal of the conditional use permit grant, along with the administrative assistant's supporting affidavit.

Salt Lake County filed the complete certified administrative record with the district court on March 3, 1988. On March 15, 1988, the district court entered its decision, finding that the Salt Lake County Planning Commission had properly issued the conditional use permit, and that defendants' actions did not violate the annexation statute, Utah Code Ann. §10-2-418 (1986). It granted summary judgment in favor of defendants and dismissed Sandy City's action. Subsequently, Sandy City unsuccessfully moved for an injunction on the development of the property during the pendency of the appeal. It then brought this appeal.

On appeal, Sandy City challenges the summary judgment, first arguing that there were substantial issues of material fact making summary judgment improper because: (1) Salt Lake County untimely submitted the adminstrative record in violation of rule 6(d) of the Utah Rules of Civil Procedure; (2) Salt Lake County's administrative record and affidavits were untimely filed in violation of rule 56 of the Utah Rules of Civil Procedure; (3) the affidavits and other evidence presented by Chevron violated rule 56(e) of the Utah Rules of Civil Procedure by lacking an adequate evidentiary foundation; (4) the trial court erred in refusing to grant Sandy City's rule 56(f) motion for further discovery; and (5) there were substantial issues of material fact in the record. Sandy City's second major assignment of error is that the trial court erroneously interpreted Utah Code Ann. §§10-2-418 and 10-1-4(11) (1986) by ruling that (1) to preclude urban development of the property at issue, Sandy City had to formally declare its intention to annex it prior to the occurrence of the events leading to this lawsuit, and (2) the Chevron development, and possibly the McDonald's development, did not constitute "urban development" under section 10-1-4(11).

I. FACTUAL AND EVIDENTIARY ISSUES

Before we address Sandy City's contentions, however, it is necessary to examine the scope of our review in cases dealing with summary judgment and municipal zoning issues.[2]

In reviewing a summary judgment, an appellate court "consider[s] the evidence in the light most favorable to the losing party, and affirm[s] only where it appears there is no genuine dispute as to any material issues of fact, or where, even according to the facts as contended by the losing party, the moving party is entitled to judgment as a matter of law." *Briggs v. Holcomb*, 740 P.2d 281, 283 (Utah Ct. App. 1987).

It is well established in Utah that "courts of law cannot substitute their judgment in the area of zoning regulations for that of the [municipality's] governing body." *Naylor v. Salt Lake City Corp.*, 16 Utah 2d 192, 398 P.2d 27, 29 (1965) (footnote omitted). Instead, the courts afford a comparatively wide latitude of discretion to administrative bodies charged with the responsibility of zoning, as well as endowing their actions with a presumption of correctness and validity, because of the complexity of factors involved in the matter of zoning and the specialized knowledge of the administrative body. *Cottonwood Heights Citizen Ass'n v. Board of Comm'rs*, 593 P.2d 138, 140 (Utah 1979). Thus, the courts will not consider the wisdom, necessity, or advisability or otherwise interfere with a zoning determination unless "it is shown that there is no reasonable basis to justify the action taken." *Id.*

In a zoning action, Utah Code Ann. §10-9-15 (1986) indicates that an aggrieved party may "maintain a plenary action for relief" from any decision of the municipal body within thirty days of the filing of the decision. The Utah Supreme Court stated that "[t]he statutory language 'plenary action *for relief therefrom*' presupposes the continued existence of the administrative action, thus suggesting an appeal rather than a trial de novo." *Xanthos v. Board of Adjustment*, 685 P.2d 1032, 1034 (Utah 1984). However, "[t]he

nature and extent of the review depends on what happened below as reflected by a true record of the proceedings, viewed in the light of accepted due process requirements." *Denver & Rio Grande W. R.R. Co. v. Central Weber Sewer Improvement Dist.*, 4 Utah 2d 105, 287 P.2d 884, 887 (1955). The supreme court also found, in *Xanthos*, that where a hearing has proceeded in accordance with due process requirements, the reviewing court can look only to the record, which consists of the hearing minutes along with the formal findings and order. *Xanthos*, 685 P.2d at 1034. However, where no record is preserved, and there is, consequently, nothing to review, the reviewing court may take evidence. *Id.* While this evidence is not necessarily limited to the evidence presented below, the reviewing court may not retry the case on the merits or substitute its judgment for that of the municipal body. *Id.*

Because an administrative record has been preserved in the present circumstance, we find that this matter should be reviewed on the record, and that a de novo trial is inappropriate.

Under these standards of review, we now examine Sandy City's claims that the trial court improperly granted summary judgment on evidentiary issues.

A. Admission of Administrative Record

First, Sandy City alleges that Salt Lake County untimely submitted the administrative record in violation of rule 6(d) of the Utah Rules of Civil Procedure. It argues that rule 6(d) requires supporting affidavits to be submitted at the time a party files a motion for summary judgment, and that the administrative record is analogous to a supporting affidavit. Because the County submitted the administrative record during the hearing on the motion for summary judgment, rather than beforehand, and, consequently, failed to give Sandy City notice of the contents of the record, Sandy City concludes that the trial court should not have considered the evidence contained in this record in arriving at its summary judgment. On the other hand, the County argues that the Rules of Civil Procedure do not set forth any specific procedure for certifying an administrative record from a county commission to the district court, so rule 6(d) is inapplicable here because it deals only with the filing of affidavits.

In relevant part, rule 6(d) states:

> When a motion is supported by an affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 59(c), opposing affidavits may be served not later than 1 day before the hearing, unless the court permits them to be served at some other time.

Prior to the hearing before the district c on February 5, 1988, the County submi the minutes of the Salt Lake County Plann Commission hearings held on April 28, M 12, September 22, October 13, and Octo 27, 1987, along with authenticating affidav These minutes contained testimony on all the disputed issues. The record which County moved to be placed into evide during the district court hearing contai these minutes, accompanied by some docu entation and a large quantity of plat ma but did not add materially to the relev information already before the court. court admitted this record into evidence o the strenuous objections of Sandy City, stat that "everything down there is not essential a determination of these motions. And I th that quite apart from this, [even] if the co disregarded this, it will have before it suf ient undisputed facts of law to make decisi in the matter." Subsequently, the court ad itted into evidence, as part of the record, minutes of the Salt Lake County Commiss hearing held on December 9, 1987, which h not previously been available, and vario documents that were specifically requested Sandy City's attorney.

Our review of the record, including t administrative record submitted to the cou indicates that if there was any error in adr tting the administrative record, it was harml because it was essentially cumulative w respect to the evidence already before t court. Further, some of the subsequen admitted evidence was admitted at San City's request.

However, we find that the trial court c not err in admitting the administrative reco at the time of trial. If we follow rule 6(d) l erally, styling the administrative record as t equivalent of an affidavit in support of motion for summary judgment, the documer must be served not later than one day befc the hearing unless the court permits them be served at some other time. The court, th refore, has discretion to admit such documer at other times, including during the hearin In this case, the court admitted documer during and after the hearing, in response requests made by both parties.

However, there are limitations to this dis retion. Although the Utah Supreme Court h found that the notice provisions of rule 6(are not hard and fast, it has stated that a tri court may dispense with technical complian to them only if there is satisfactory proof th a party had "actual notice and time to prepa to meet the questions raised by the motion an adversary." *Jensen v. Eames*, 30 Utah 2 423, 519 P.2d 236, 238 (1974) (footno omitted); *see also Western States Thrift Loan Co. v. Blomquist*, 29 Utah 2d 58, 5(P.2d 1019, 1021 (1972); *Bairas v. Johnson*, 1

Utah 2d 269, 373 P.2d 375, 378-79 (1962).

Although Sandy City objected to the admission of the administrative record on the ground that it did not know what it contained and, therefore, was unprepared to argue against it, the trial court properly denied this objection because the entire record was a matter of public record, had been on file for a substantial period of time prior to the hearing, and both parties had access to it. Further, significant portions of the record, in the form of the commission minutes, were already before the court and Sandy City had ample opportunity to become familiar with them. We find no abuse of discretion in the court's ruling.

B. Adequate Evidentiary Foundation

Sandy City's next claim of error is that the affidavits and other evidence presented by Chevron and the other defendants violate rule 56 of the Utah Rules of Civil Procedure because they lacked an adequate evidentiary foundation.

The relevant portion of rule 56(e) states that "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Inadmissible evidence cannot be considered in ruling on a motion for summary judgment, *D & L Supply v. Saurini*, 775 P.2d 420, 421 (Utah 1989); *Creekview Apartments v. State Farm Ins. Co.*, 771 P.2d 693, 695 (Utah Ct. App. 1989); so an affidavit which does not meet the requirements of rule 56(e) is subject to a motion to strike. *Howick v. Bank of Salt Lake*, 28 Utah 64, 498 P.2d 352, 353-54 (1972); *see also Blomquist*, 504 P.2d at 1020-21 (an affidavit containing statements made only "on information and belief" is insufficient and will be disregarded).

Sandy City moved to strike defendants' affidavits for their failure to conform to these requirements. In its motion to strike, Sandy City attacked defendant Chevron's memorandum in support of its motion for summary judgment and the affidavit of Helen J. Christiansen, along with its attached exhibits, to the extent that they were used to establish the allegations set forth in Chevron's memorandum.

Helen J. Christiansen's affidavits served to establish that she was the custodian of the record before the Salt Lake County Planning Commission and that, on the basis of her personal knowledge, the hearing minutes and a copy of McDonald's Corporation's application for a conditional use permit were the correct records of the Salt Lake County Planning Commission. Under rules 902(4) and 1005 of the Utah Rules of Evidence, public records are admissible as an exception to the general rule excluding hearsay evidence if they are "certified as correct by the custodian." Utah R. Evid. 902(4). Therefore, Ms. Christiansen's affidavit conformed to rule 56(e) with regard to the admission of the exhibits as portions of the administrative record before the Salt Lake County Planning Commission. As such, they are admissible evidence and are not subject to a motion to strike.

Sandy City challenges various statements made in these minutes as being without evidentiary foundation. These allegations, however, go to the merits of granting the conditional use permit and not to any procedural defects. Therefore, we are not concerned with them under our standard of review. Consequently, we find Sandy City's objections to the foundation of statements made in the record to be without merit.

C. Further Discovery

Sandy City argues that the district court erred in refusing to permit it to conduct further discovery pursuant to rule 56(f) of the Utah Rules of Civil Procedure. Rule 56(f) provides that a court may continue a motion for summary judgment to permit the moving party to obtain affidavits or take depositions. *Hunt v. Hurst*, 785 P.2d 414, 416 (Utah 1990). Rule 56(f) reads as follows:

> Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

It is generally held that rule 56(f) motions should be granted liberally to provide adequate opportunity for discovery, *Cox v. Winters*, 678 P.2d 311, 313 (Utah 1984), *Callioux v. Progressive Ins. Co.*, 745 P.2d 838, 841 (Utah Ct. App. 1987); because information gained during discovery may create genuine issues of fact sufficient to defeat a motion for summary judgment. *Downtown Athletic Club v. Horman*, 740 P.2d 275, 278 (Utah Ct. App. 1987). However, courts are unwilling to "spare the litigants from their own lack of diligence," *Callioux*, 745 P.2d at 841 (quoting *Hebert v. Wicklund*, 744 F.2d 218, 222 (1st Cir. 1984)), so do not grant rule 56(f) motions when dilatory or lacking in merit. *Reeves v. Geigy Pharmaceutical, Inc.*, 764 P.2d 636, 639 (Utah Ct. App. 1988); *Downtown Athletic Club*, 740 P.2d at 278-79.

A rule 56(f) movant must file an affidavit to preserve his or her contention that summary judgment should be delayed pending further discovery. *Callioux*, 745 P.2d at 841. In this affidavit, the movant must explain how the requested continuance will aid his or her

opposition to summary judgment. *Id.* The trial court has discretion to determine whether the reasons stated in a rule 56(f) affidavit are adequate. *Reeves*, 764 P.2d at 639.

Sandy City filed an affidavit with the court along with its rule 56(f) motion, stating that it had been unable to take defendants' depositions or to obtain a certified copy of certain county commission minutes. It indicated that it wanted to pursue additional discovery which would show that: (1) the proposed use of the property contradicted the county master plan and that insufficient evidence had been presented to the County Planning Commission to demonstrate conformity with the plan; (2) the proposed zoning would not contribute to the general well-being of the neighborhood; (3) the proposed use would be detrimental to the health, safety, and general welfare of persons residing in the vicinity; (4) the true scope, costs, and impact of the development was not accurately and fully communicated to the county officials during the decision-making process; and (5) the costs of the development would substantially exceed $750,000.

To determine whether this affidavit was sufficient to merit a rule 56(f) continuance, several factors must have been considered:

> (1) Were the reasons articulated in the Rule 56(f) affidavit "adequate" or is the party against whom summary judgment is sought merely on a "fishing expedition" for purely speculative facts after substantial discovery has been conducted without producing any significant evidence? (2) Was there sufficient time since the inception of the lawsuit for the party against whom the summary judgment is sought to use discovery procedures, and thereby cross-examine the moving party? (3) If discovery procedures were timely initiated, was the non-moving party afforded an appropriate response?

Callioux, 745 P.2d at 841; *see also Reeves*, 764 P.2d at 639; *Downtown Athletic Club*, 740 P.2d at 278.

In determining if Sandy City's request for further discovery was meritorious, we first consider the relevant standard of review. As we noted above, in municipal zoning decisions, the courts do not consider the wisdom, necessity, or advisability of particular actions. *See Sandy City v. City of South Jordan*, 652 P.2d 1316, 1318-19 (Utah 1982). Instead, the reviewing court may consider whether the municipality acted in conformance with its enabling statutes and ordinances pursuant to its comprehensive plan. *Naylor v. Salt Lake City Corp.*, 16 Utah 2d 192, 398 P.2d 27, 28-29 (1965). The court may not substitute its judgment for that of the municipality on the merits of these issues, however. *Id.* at 129.

The trial record contained evidence as to Salt Lake County's enabling statutes, ordinances, and plans. It also indicated that the Salt Lake County Commission considered evidence with respect to all the issues on which Sandy City wished to perform additional discovery. The Salt Lake County Commission made findings of fact going to the merits of these issues.[3] Discovery relating to the merits of the issues was improper under the standard of review, but could properly be held with respect to enabling statutes and procedural issues. However, there was already substantial evidence on the record regarding the relevant enabling statutes and plans. Further, Sandy City did not allege in its affidavit that it needed additional time to discover procedural errors committed by Salt Lake County in granting the conditional building permit. Therefore, we find that the trial court could reasonably conclude that the reasons Sandy City articulated in its affidavit would produce only cumulative evidence and, so, were inadequate to merit a continuance under rule 56(f).

Further, Sandy City had sufficient time and opportunity during the pendency of the action before the county commissions to develop and present evidence in its favor and to determine and refute the defendants' evidence. The record indicates that on August 5, 1987, the Salt Lake County Commission adopted the zoning ordinance allowing commercial development on the property at issue, following hearings on the issue held in April and May of 1987. Sandy City objected to the rezoning at this time but failed to appeal. On August 26, 1987, Postero-Blecker applied for the Chevron conditional use permit. Sandy City protested the application on September 18, 1987, and subsequently was involved in several public hearings on the issue before both the Salt Lake County Planning Commission and the Salt Lake County Commission, at which it had ample opportunity to present evidence. Sandy City appealed to the district court in December 1987. The hearing on the summary judgment motion was finally held on February 5, 1988, nearly a year after the initial zoning hearings had taken place. As stated previously, the court will not use a rule 56(f) motion to shield the movant from his or her lack of diligence.

Finally, in a rule 56(f) motion,

> [t]he mere averment of exclusive knowledge or control of the facts by the moving party is not adequate: the opposing party must show to the best of his ability what facts are within the movant's exclusive knowledge or control; what steps have been taken to obtain the desired information pursuant to discovery procedures under the

> Rules; and that he is desirous of taking advantage of these discovery procedures.

Callioux, 745 P.2d at 840-41 (quoting 2 J. Moore, W. Taggart & J. Wicker, Moore's Federal Practice par. 56.24 (2nd ed. 1987)). Sandy City's affidavit did not comply with these requirements. Therefore, we conclude that the district court did not abuse its discretion in denying Sandy City's rule 56(f) motion.

D. Genuine Issues of Material Fact

Sandy City argues that the court failed to consider evidence which created the following genuine issues of material fact: (1) Sandy City's willingness to annex, as shown by its express declaration in its annexation policy declaration and its attorney's statements before the Salt Lake County Planning Commission; (2) that the projected cost of the Chevron project exceeded $750,000, as shown by a certified appraisal setting the cost as between $660,000 and $760,000; (3) that the Chevron station was only part of a larger scheme to develop the 4.18-acre parcel, in that the Chevron station would take only 1/6 of the parcel, the property owners' represented that the property would be a "commercial subdivision," and that they would be the sole developers of the entire tract; (4) that the cost for the entire development, excluding the cost of the land, would exceed $750,000; and (5) the development was not in compliance with the county master plan and county ordinances which called for rural use of the subject property, and would create traffic hazards and planning problems.

Many of these issues are actually issues of law. The only issues of fact are the projected cost of the project and whether the proposed development was in compliance with the county master plan and county ordinances. As we have noted above, these issues were discussed and evidence was presented before the county commissions, which entered written findings and decided them on their merits. Because their findings were supported by evidence, we do not disturb them on review. See *USX Corp. v. Industrial Comm'n*, 781 P.2d 883, 885-86 (Utah Ct. App. 1989) (administrative agency's factual findings will not be disturbed unless they are "arbitrary and capricious").

II. LEGAL ISSUES

We next address Sandy City's contention that the trial court erred in its interpretation and application of Utah Code Ann. §10-2-418 (1986) and §10-1-4(11) (1986). Because summary judgment is granted as a matter of law rather than fact, the appellate court is free to reappraise the trial court's legal conclusions. *Bonham v. Morgan*, 102 Utah Adv. Rep. 8, 9 (1989) (per curiam); *Parents Against Drunk Drivers v. Graystone Pines Homeowner's Ass'n*, 129 Utah Adv. Rep. 45, 46 (Ct. App. 1990); *Western Fiberglass, Inc. v. Kirton, McConkie & Bushnell*, 129 Utah Adv. Rep. 28, 29 (Ct. App. 1990).

A. Annexation Procedure

Utah Code Ann. §10-2-418 prohibits urban development "within one-half mile of a municipality in the unincorporated territory which the municipality has proposed for municipal expansion in its policy declaration, *if a municipality is willing to annex the territory proposed* for such development under the standards and requirements set forth in this chapter." (Emphasis added.) The parties disagree as to whether Sandy City, to prevent urban development in the disputed territory, was required under this statute to formally declare its intention to annex the territory prior to the events leading to this lawsuit.

Utah Code Ann. §10-2-414 (1986) requires a municipality, prior to annexing unincorporated territory of more than five acres, to adopt a policy declaration indicating the standard under which it is willing to annex the territory. Sandy City argues that it expressly declared its willingness to annex the property before initiation of the present lawsuit by (1) promulgating a general policy declaration indicating its willingness to annex the property, if petitioned, along with twenty other parcels; and (2) its counsel's direct statement to the Salt Lake County Planning Commission that it was willing to annex the property. The trial court found that Sandy City was obliged to make a formal declaration of intent to annex, in addition to its general policy declaration, to invoke the protection of section 10-2-414.

Even though Sandy City, in its master policy declaration, had indicated its interest in annexing the property should the property owners so petition, the property owners never petitioned, nor did Sandy City attempt to annex the property on its own. Further, it did not appeal the county's initial zoning decision pursuant to Utah Code Ann. §10-9-9 (1986), and raise this issue at that time. Instead, it waited to raise the issue on the subsequent grant of the conditional use permit, where the relevant issues do not include the proposed use of the land or any annexation issue, but only whether the proposed use comports with the previously enacted zoning regulations and county master plan. Because Sandy City could and should have raised this issue earlier, we find that it is precluded from raising it now. *See Ringwood v. Foreign Auto Works*, 786 P.2d 1350, 1357 (Utah Ct. App. 1990). As such, we do not address the issue of whether Sandy City was required under section 10-2-418, in addition to its master policy declaration, to officially declare its willingness to annex a territory of less than five acres.[4] Consequently, we find Sandy City's objection to be without merit.

We affirm the trial court's finding against Sandy City on this issue, even though we assign a totally different rationale than that used by the trial court. *See, e.g., Ostler v. Ostler*, 131 Utah Adv. Rep. 15, 17 (Ct. App. 1990).

B. Urban Development

Utah Code Ann. §10-2-418 (1986) states that "[u]rban development shall not be approved or permitted within one-half mile of a municipality in the unincorporated area which the municipality has proposed for municipal expansion in its policy declaration." "Urban development" is defined in Utah Code Ann. §10-1-104(11) (1986) as "a housing subdivision involving more than 15 residential units with an average of less than one acre per residential unit or a commercial or industrial development for which cost projections exceed $750,000 for any or all phases."

Pursuant to its objective of preventing the proposed development of the disputed territory, Sandy City argues that the trial court erred in finding the value of the proposed development did not exceed $750,000 because (1) the definition of "urban development" under section 10-1-104 includes not only the value of the building itself, but also the cost of the land and the value of the building fixtures; and (2) the $750,000 figure encompasses all commercial ventures to be built on the disputed territory. Salt Lake County, on the other hand, alleges that the only relevant cost under the definition is that of the building alone and does not include the land and building fixtures, and that the $750,000 figure applies to each individual development venture separately initiated on the property.

Again, because Sandy City has not made any attempt to annex the territory and should have raised its objections to urban development at the time of the zoning determination rather than at the subsequent granting of a conditional use permit, we decline to interpret this statute. Because the interpretation of section 10-2-414 would have no relevance to the propriety of the county's grant of a conditional use permit under our standard of review, any interpretation we would make would be an advisory opinion, which we decline to issue under well established standards of judicial review. *See Ringwood v. Foreign Auto Works, Inc.*, 786 P.2d 1350, 1357 (Utah Ct. App. 1990) (where the result in the prior action constitutes the full relief available to the parties on the same claim, or where the issue could and should have been litigated in the prior action, the claim is precluded under the doctrine of res judicata); *Reynolds v. Reynolds*, 129 Utah Adv. Rep. 32, 33 (Ct. App. 1990) (there is a longstanding judicial policy in Utah to avoid advisory opinions). Therefore, we find this issue to be without merit.

Regnal W. Garff, Judge

I CONCUR:
Norman H. Jackson, Judge

I CONCUR IN THE RESULT:
Russell W. Bench, Judge

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1. Under Utah Code Ann. §17-27-16 (1987), a appeal from a zoning decision must be made withi the time and according to the procedure specified b the board of county commissioners. While thes regulations are not a part of this record, there is n dispute that Sandy City failed to appeal the rezonin pursuant to these regulations.

2. Sandy City relies upon annexation statutes an characterizes some of the issues as annexation related, however this appeal is from the grant of conditional use permit, a zoning function.

3. The Salt Lake County Commission findings state in part:

> 1. The estimated cost of the development is approximately $175,000
>
> ....
>
> 2. This development is consistent with the intent of the Salt Lake County Master Plan by placing commercial development at major intersections within the county. The Little Cottonwood District Plan was generally intended to be applicable through 1985 and the map is now outdated in this immediate area. Since the adoption of the plan in 1976, Sandy City rezoned the northeast corner of 10600 South 1300 East to commercial, which changed the character of the intersection. Additional commercial development is now appropriate at this intersection and is consistent with the existing development approved by Sandy City.
>
> 3. The development will provide additional gasoline services which are needed and desirable in the neighborhood and community ....
>
> 4. The development is buffered from adjacent residential uses by property zoned R-M and will not be detrimental to the health, safety or general welfare of persons residing or working in the vicinity or injurious to property or improvements in the vicinity. The traffic engineer has reviewed and approved the application. Upon compliance with the conditions required by the Planning Commission, the development will be an attractive addition to the community.
>
> 5. The proposed use will comply with the regulation and conditions of the Zoning Ordinance.

4. We note that the property at issue consists of 4.18 acres while section 10-2-418 applies to parcels consisting of at least five acres. Therefore, section 10-2-418 would be inapplicable in the present case.

IN THE UTAH COURT OF APPEALS

----ooOoo----

Sandy City, a municipal corporation, Plaintiff and Appellant, v. Salt Lake County, a political subdivision of the State of Utah; Salt Lake County Planning Commission; K. Delyn Yeates; R. Scott Priest; W. Scott Kjar; Steven E. Smoot; Postero-Blecker, Inc.; and Chevron U.S.A., Inc., Defendants and Appellees.	ORDER DENYING PETITION FOR REHEARING Case No. 880429-CA Salt Lake County Third District Court C87-07304

THIS MATTER having come before the Court upon Appellant's Petition for Rehearing, filed June 26, 1990,

IT IS HEREBY ORDERED that the Appellant's Petition for Rehearing is denied.

Dated this 6th day of August, 1990.

FOR THE COURT

Mary Noonan

Mary T. Noonan, Clerk

CERTIFICATE OF MAILING

I hereby certify that on the 6th day of August, 1990, a true and correct copy of the foregoing ORDER DENYING PETITION FOR REHEARING was deposited in the United States mail.

Walter R. Miller
Sandy City Attorney
Attorney for Plaintiff and Appellant
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Brinton R. Burbidge
Kirton, McConkie & Bushnell
Attorney for K. Delyn Yeates,
R. Scott Priest, W. Scott Kjar,
Steven E. Smoot, and Postero-Blecker, Inc.,
330 South Third East
Salt Lake City, UT 84111

DATED this 6th day of August, 1990.

By _____
Deputy Clerk

Exhibit C

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

SANDY CITY, a municipal corporation of the State of Utah,	:	MEMORANDUM DECISION
	:	CIVIL NO. C-87-7304
Plaintiff,	:	
vs.	:	
SALT LAKE COUNTY, a political subdivision of the State of Utah, et al.,	:	
Defendants.	:	

Plaintiff's and defendants' Motions for Summary Judgment came before this Court on the 5th day of February, 1988. All parties were represented by respective counsel. After argument, the Court took the matter under advisement. On the 25th day of February, 1988, Salt Lake County's Motion for Certification of Record came before this Court. The matter was taken under advisement, subject to plaintiff supplementing the record. After reviewing the file, Memoranda, record and arguments, the Court finds as follows.

1. Salt Lake County Commission acted properly in rezoning the property in question, and was not in violation of any county ordinance or county master plan, and did not act arbitrarily and capriciously. Furthermore, Sandy City appears to have waived its right to object to rezoning.

2. Salt Lake County Planning Commission and Salt Lake County Commission properly issued a conditional use permit for development of the subject property. The project, based on the facts, is necessary and desirable, and not detrimental to the general welfare. Furthermore, the defendant Chevron Incorporated acted properly in processing its application through the only body with jurisdiction at the time, Salt Lake County. Sandy City did not have jurisdiction to accept the application.

3. Defendants' actions do not violate Utah Code Ann., Section 10-2-418.

(a) Defendants' development does not constitute "urban development" proposed within a restricted, unincorporated area.

(b) Sandy City has not clearly stated it would annex the subject property, but only that it will consider annexation. It was not until the present lawsuit was filed that it indicated that it would annex the subject property. Even if Chevron petitioned for annexation and Sandy City annexed, there is no assurance Sandy City would approve Chevron's application. Furthermore, Chevron is not required to petition Sandy City for annexation.

(c) The value of the fixtures and personal property should not be considered. The projected cost of the proposed service station project is under $750,000.00. Furthermore, the application of Chevron should be considered a single development.

(d) Even if Chevron's application were not considered a single development, and were combined with McDonald's project, the project will still not exceed $750,000.00.

(e) At this time Chevron has taken all the necessary procedures for approval of their application, and is ready to proceed with their project.

4. Based on the facts before the Court, it appears that Salt Lake County Commission has conducted a hearing that comported with all due process requirements. It appears to have acted within the scope of its authority, has conducted hearings, and arrived at a decision, and does not appear to have acted in excess of its authority, or in a manner so clearly outside reason that its action must be deemed capricious and arbitrary. Peatross v. Board of Commissioners of Salt Lake City, 555 P.2d 281 (1976).

5. Accordingly, it is the opinion of this Court that Sandy City's Motion to Strike should be denied, and Sandy City's Motion for Summary Judgment should be denied. Furthermore, all of the defendants' Motions for Summary Judgment and Salt Lake County's Motion for Certification should be granted. Counsel for defendant Chevron is to prepare an Order for the Court's

signature. Said Order should be approved as to form by all parties.

Dated this 15TH day of March, 1988.

RAYMOND S. UNO
DISTRICT COURT JUDGE

ATTEST
H. DIXON HINDLEY
Clerk
By
Deputy Clerk

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision, postage prepaid, to the following, this 15th day of March, 1988:

STATE OF UTAH)
COUNTY OF SALT LAKE) ss

I, THE UNDERSIGNED, CLERK OF THE DISTRI
COURT OF SALT LAKE COUNTY UTAH, DO HERE
CERTIFY THAT THE ANNEXED AND FOREGOING
A TRUE AND FULL COPY OF AN ORIGINAL DOC
MENT ON FILE IN MY OFFICE AS SUCH CLERK
WITNESS MY HAND AND SEAL OF SAID COU
THIS ___ DAY OF ___ 19__
H. DIXON HINDLEY, CLERK
BY ___ DEPU

Walter R. Miller
Attorney for Plaintiff
440 East 8680 South
Sandy, Utah 84070

Kent S. Lewis
Deputy County Attorney
Attorney for Salt Lake County Defendants
2001 S. State, Suite S3600
Salt Lake City, Utah 84190-1200

Leonard J. Lewis
John W. Andrews
Attorneys for Defendant Chevron
50 S. Main, Suite 1600
P.O. Box 45340
Salt Lake City, Utah 84145

Brinton R. Burbidge
Attorney for Defendants Yeates, Priest,
Kjar and Smoot
330 South 300 East
Salt Lake City, Utah 84111-2599

Darlene Nadeau

Exhibit D

VAN COTT, BAGLEY, CORNWALL & McCARTHY
Leonard J. Lewis, #1947
John W. Andrews, #4724
Attorneys for Chevron USA, Inc.
50 South Main Street, Suite 1600
P. O. Box 45340
Salt Lake City, Utah 84145
Telephone: (801) 532-3333

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

SANDY CITY, a municipal corporation of the State of Utah, Plaintiff, vs. SALT LAKE COUNTY, a political subdivision of the State of Utah, SALT LAKE COUNTY PLANNING COMMISSION, K. DELYN YEATES, R. SCOTT PRIEST, W. SCOTT KJAR, STEVEN E. SMOOT, POSTERO-BLECKER, INC., and CHEVRON U.S.A., INC., Defendants.	ORDER AND JUDGMENT OF DISMISSAL Civil No. C87-7304 Honorable Raymond Uno

The following matters came on for hearing before the Honorable Raymond S. Uno, District Judge, on Friday, the 5th day of February 1988, at 2:00 p.m.: (1) Defendant Chevron U.S.A., Inc.'s Motion For Summary Judgment; (2) Defendants Salt Lake County and Salt Lake County Planning Commission's Motion For Summary Judgment; (3) Defendants Smoot, Kjar, Priest and Yeates' Motion For Summary Judgment; (4) Plaintiff Sandy City's

Motion For Summary Judgment; and (5) Plaintiff Sandy City's Motion To Strike. Leonard J. Lewis and John W. Andrews appeared on behalf of defendant Chevron U.S.A., Inc.; Kent S. Lewis appeared on behalf of defendants Salt Lake County and Salt Lake County Planning Commission; Brinton R. Burbidge appeared on behalf of defendants Smoot, Kjar, Priest and Yeates; and Walter R. Miller appeared on behalf of plaintiff Sandy City.

The Court having reviewed the record and the memoranda and arguments of the parties, and good cause appearing, it is hereby ORDERED, ADJUDGED and DECREED as follows:

(1) Plaintiff Sandy City's Motion For Summary Judgment and Motion To Strike are denied;

(2) It appearing that no material issues of fact exist, and that defendants are entitled to judgment as a matter of law, defendants' Motions For Summary Judgment are hereby granted. It is hereby ordered that the Verified Complaint of Sandy City in this action and all causes of action contained therein be stricken, and this action be and hereby is dismissed with prejudice.

DATED this 6th day of April, 1988.

BY THE COURT:

Raymond S. Uno
District Judge

ATTEST
H. DIXON HINDLEY
Clerk
By Deputy Clerk

APPROVED AS TO FORM:

VAN COTT, BAGLEY, CORNWALL
& McCARTHY
Leonard J. Lewis, Esq.
John W. Andrews, Esq.
Attorneys for Defendant
Chevron U.S.A.,Inc.
50 South Main Street, Suite 1600
P. O. Box 45340
Salt Lake City, Utah 84145

Walter R. Miller, Esq.
Sandy City Attorney
Attorney for Plaintiff
440 East 8680 South
Sandy, Utah 84070

Kent S. Lewis, Esq.
Deputy County Attorney
Attorney for Salt Lake County
Defendants
2001 South State Street
#53600
Salt Lake City, Utah 84190-1200

Brinton R. Burbidge, Esq.
KIRTON, McCONKIE & BUSHNELL
Attorneys for Defendants
Smoot, Kjar, Priest and Yeates
330 South 300 East
Salt Lake City, Utah 84111

5747A

37. The City has exhausted all administrative remedies and no other plain, speedy or adequate remedy exists.

38. The City is entitled to the remedies hereafter set forth in its Prayer for Relief.

RESERVATION OF CLAIMS

39. The City hereby expressly reserves the right to assert other and further claims against the County and its Planning Commission arising out of or in connection with its conduct with respect to the Property or their annexation and taxation policies as and when such claims may arise or become ascertainable, whether at law or in equity, that may or may not be subject to the Utah Governmental Immunity Act.

PRAYER FOR RELIEF

WHEREFORE, the City prays the Court grant relief as follows:

1. For judgment declaring that the actions of the County and its Planning Commission in making the proposed development possible were illegal and void;

2. For a prohibitive injunction and extraordinary writ enjoining the issuance or obtaining of a building permit or other authorizations or approvals from the County related to development of the Property or buildings or improvements thereon;

3. For a mandatory injunction and extraordinary writ requiring Defendants to remove any building or improvements constructed on the Property or to comply with annexation laws

relating to urban development and bring the Property into compliance with Sandy City Development Codes.

4. For an accounting of all funds heretofore and hereafter paid to the County and arising from development, use, or ownership of this property and improvements thereon;

5. For an injunction and extraordinary writ requiring (1) payment of the funds specified in the foregoing paragraph, or equivalent funds, to plaintiff; (2) reimbursement to plaintiff of all reasonable expenses incurred as a result of illegal actions by defendants; and (3) compliance by defendants in all respects with provisions of the state annexation statute.

6. For interest, costs and such other relief as may be appropriate at the time of judgment.

DATED this 12 day of November, 1987.

WALTER R. MILLER
Attorney for Plaintiff

EXHIBIT F

DAVID E. YOCOM (3581)
Salt Lake County Attorney
By: Kent S. Lewis (1945)
Deputy County Attorney
Attorneys for Appellees
Salt Lake County and Salt Lake
County Planning Commission
2001 South State Street, #S3600
Salt Lake City, Utah 84190-1200
Telephone: (801) 468-3420

IN THE UTAH SUPREME COURT

SANDY CITY, a municipal corporation, Plaintiff and Appellant, -vs- SALT LAKE COUNTY, a political subdivision of the State of Utah, SALT LAKE COUNTY PLANNING COMMISSION, K. DELYN YEATES, R. SCOTT PRIEST, W. SCOTT KJAR, STEVEN E. SMOOT, POSTERO-BLECKER, INC. and CHEVRON U.S.A., INC., Defendants and Appellees.	AFFIDAVIT OF LEONARD J. LEWIS Court of Appeals No. 880429-CA

STATE OF UTAH)
: ss.
County of Salt Lake)

LEONARD J. LEWIS, being first duly sworn upon oath, states as follows:

1. I am legal counsel for Postero-Blecker, Inc. and Chevron U.S.A., Inc. in the captioned matter.

2. All defendants except Salt Lake County have entered into a settlement agreement with Sandy City which resulted in dismissal of the Petition for Writ of Certiorari as to all defendants except Salt Lake County.

3. As part of the settlement agreement, Chevron U.S.A., Inc. agreed to annex to Sandy City 1.24 acres of land located at approximately 10600 South and 1300 East which includes the land upon which the Chevron service station is located.

4. Chevron U.S.A., Inc. has filed with Sandy City a petition to annex the above-described property to Sandy City. A copy of said petition is attached hereto.

DATED this 16th day of October, 1990.

LEONARD J. LEWIS

SUBSCRIBED and SWORN to before me this 16th day of October, 1990.

Dorothy R. Oxborrow
NOTARY PUBLIC
Residing at Salt Lake City, UT

My Commission Expires:

March 1, 1994

R1086

Notary Public
DOROTHY R. OXBORROW
50 South Main St.
Salt Lake City, Utah 84144
My Commission Expires
March 1, 1994
State of Utah

The Honorable Lawrence P. Smith
Mayor of Sandy City
440 East 8680 South
Sandy, UT 84070

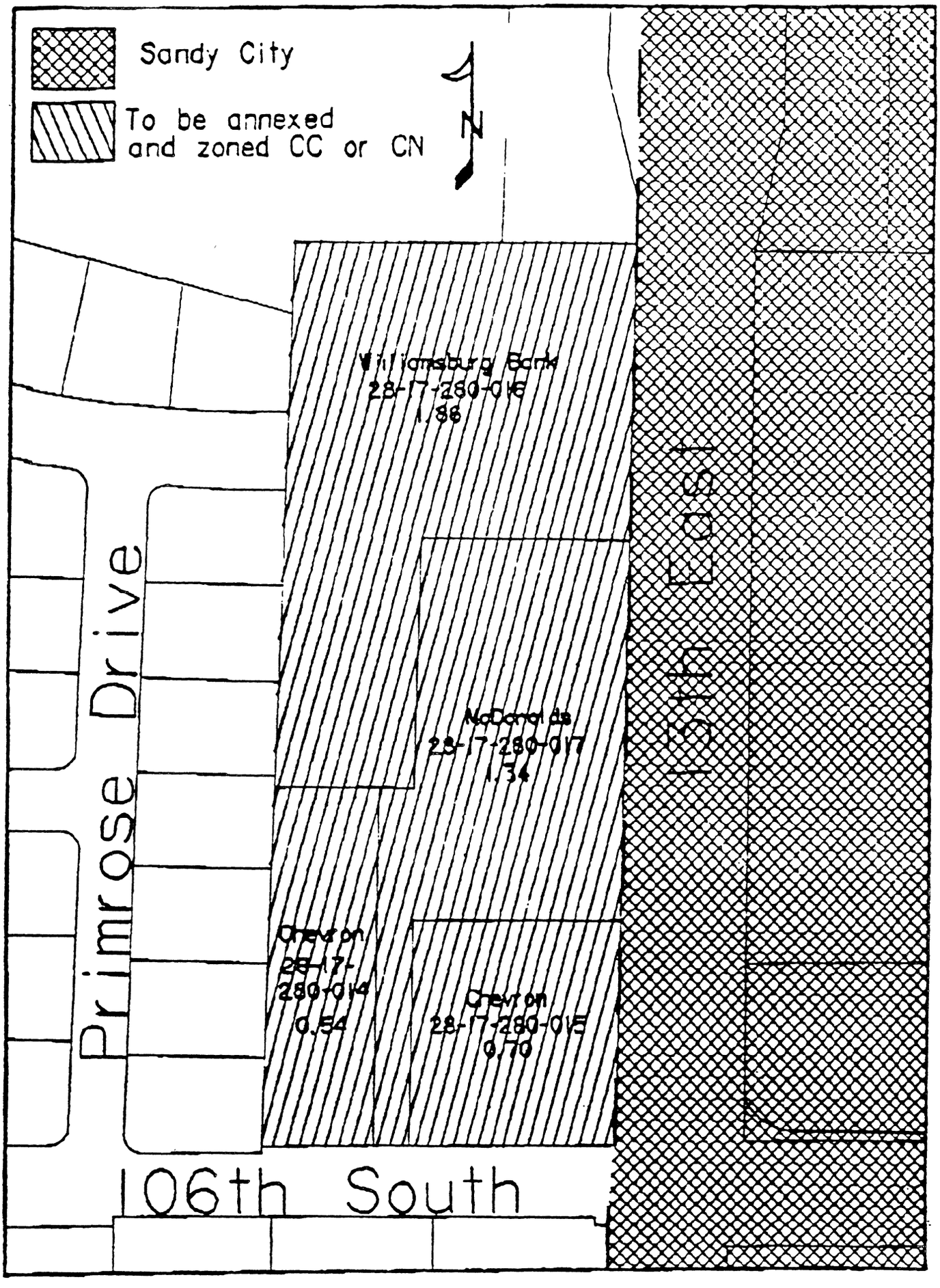
P E T I T I O N

The undersigned, constituting a majority of the owners of real property and the owners of not less than one-third in value of the real property, as shown by the last assessment rolls, lying and contiguous to Sandy City corporate limits, desire to annex and hereby petition Sandy City Corporation to accept annexation and zoning of approximately 4.44 acres of land in Section 17, Township 3 South, Range 1 East, Salt Lake Base and Meridian, as shown and described on the plat map and legal descriptions on Appendix "A" and "B" to this petition.

The undersigned also petition Sandy City to accept Neighborhood Commercial (CN) or Community Commercial (CC) zoning of such properties. Petitioners reserve the right to withdraw their annexation petition if such zoning is not approved.

Petitioner:	Date:	Address of Property:
Chevron U.S.A. Inc. By_____	10/1/90	1297 East 10600 South Salt Lake County, Utah
Resolution Trust Corporation, as conservator for Williamsburg Federal Savings and Loan By_____ John Baker, Financial Institution Specialist	_____	1225 East 10500 South Salt Lake County, Utah
McDonald's Corporation By_____	_____	10550 South 1300 East Salt Lake County, Utah

"A"


Sandy City
To be annexed and zoned CC or CN
N
Williamsburg Bank
28-17-280-016
1.86
McDonalds
28-17-280-017
1.34
Chevron
28-17-280-014
0.54
Chevron
28-17-280-015
0.70
Primrose Drive
106th South

"B"

Legal Description of Property to Be Annexed to Sandy City:

Beginning at a point N 00°38'00" E 40 feet and N 89°58'31"W 50 feet from the East quarter corner of Section 17, T3S, R1E, SL B&M; and running thence
N 0°38'00"E 690.3 feet along the W ROW line of 1300 East Street; thence
N 89°58'31"W 274.4 feet; thence
S 0°38'00"W 55.07 feet to the NE corner of White City #27 subdivision; thence following the E line of said subdivision
S 01°43'29"W 635.48 feet; thence leaving said sub line and running along the N ROW line of 10600 South Street
S 89°58'31"E 286.31 feet to the point of beginning.

Includes all of parcels:

26-17-230-014	0.54 acres	Chevron
28-17-280-015	0.70 acres	Chevron
28-17-280-016	1.66 acres	Williamsburg Savings Bank
28-17-280-017	1.34 acres	McDonalds
total:	4.44 acres	

15-9-4 PLANNED CENTER/NEIGHBORHOOD DISTRICT CN

(a) Purpose. The CN District allows for the creation of commercial centers to serve the convenience shopping and service needs of neighborhood areas of Sandy City. The Neighborhood Center District designation is intended for commercial developments that will relate to residential neighborhoods and will be compatible with residential character.

(b) Prerequisites for District Designation. For a parcel to qualify for CN District designation, it shall comply with the following:

(1) A parcel shall be at least 3 contiguous acres in size and no greater than 10 acres in land area. Parcels may be added to an existing CN District, if, however, such addition increases a district to greater than 20 acres, the enlarged district may qualify for CC designation.

(2) A CN District shall be located on at least a major collector street, preferably at one quadrant of an intersection of such streets, and in a location that is conveniently accessible from its service area.

(3) An applicant for a CN District designation shall have completed the pre-application conference for site plan review. Section 15-22-2(b).

(4) An applicant for CN designation may be required by the Director of Community Development to submit an analysis of the potential fiscal impact for the proposed neighborhood center. The analysis shall be prepared by a person or organization that is professionally qualified to perform fiscal analysis.

(5) In the event that no substantial construction of the neighborhood center is underway after one year from the date of issuance of the zone change, the Director of Community Development may recommend to the City Council that the CN designation revert to the previous designation or that the district be merged with an abutting district.

(c) Uses Allowed. A Commercial Center, Neighborhood Chapter 15-2, is allowed as a conditional use. Upon completion of site plan review and issuance of a Conditional Use Permit, the following shall be allowed as permitted uses:

(1) Athletic, Tennis, or Health Club
(2) Automotive Self-service Station
(3) Automotive Service Station
(4) Business or Financial Services

(5) Commercial Retail Sales and Services
(6) Commercial School
(7) Medical and Health Care Offices or Facilities
(8) Public Service
(9) Recreation Center
(10) Recreation, Indoor
(11) Religious or Cultural Activity
(12) Restaurant
(13) Alcoholic Beverage Class A

The following uses may be allowed but shall require a separate Conditional Use Permit:

(1) Arcade (Refer to Sandy City Arcade Ordinance)
(2) Theatre, Concert Hall
(3) Industry, Light
(4) Public Utility Station
(5) Restaurant with Drive-up Window
(6) Any use that is not integrated with the planned center or which occupies a separate lot or its own street frontage.
(7) Alcoholic Beverage Class B
(8) Alcoholic Beverage Class D
(9) Alcoholic Beverage Class E
(10) Alcoholic Beverage Entertainment
(11) Automotive Service Station
(12) Park and Ride Facilities

Location Restriction. If the building containing the use or accessories thereto located within 250 feet of a residentially zoned district, the following use shall be conditional or not permitted as indicated below.

C - indicates the use requires a Conditional Use Permit
N - indicates the use is not permitted

C - (1) Automotive Self-Service Station
C - (2) Automotive Service Station
C - (3) Recreation Center
C - (4) Alcoholic Beverage Class A
N - (5) Amusement Arcade
N - (6) Theatre, Concert Hall
N - (7) Restaurant with Drive-up Window within 100 feet of a dwelling or the probable location of a dwelling on existing residentially zoned property.

(d) Development Standards. A Neighborhood Commercial Center shall be developed in compliance with requirements of Section 15-13-3, Planned Center Standards.

(e) Building Height. Buildings shall be erected to a height of no greater than 35 feet for any part intended for human occupancy.

ORIGINAL

IN THE UTAH SUPREME COURT

SANDY CITY, a municipal corporation,	:	
Plaintiff and Appellant,	:	
vs.	:	STIPULATED MOTION TO DISMISS SPECIFIED PARTIES AND ORDER
SALT LAKE COUNTY, a political subdivision of the State of Utah, SALT LAKE COUNTY PLANNING COMMISSION, K. DELYN YEATS, R. SCOTT PRIEST, W. SCOTT KJAR, STEVEN E. SMOOT, POSTERO-BLECKER, INC. and CHEVRON U.S.A. INC.,	:	Case No. 900425 Argument Priority No. 16
Defendants and Appellees.	:	

Pursuant to Rule 37 of the Utah Rules of Appellate Procedure, Petitioner Sandy City and Respondents Chevron U.S.A. Inc., K. Delyn Yeates, R. Scott Priest, W. Scott Kjar, Steven E. Smoot, and Postero-Blecker, Inc., hereby stipulate that all the issues in the above-entitled petition are mooted with respect to said Respondents, and move that the Petition for Writ of Certiorari be dismissed with prejudice with respect to these named Respondents, each party to bear its or his own costs.

This stipulated motion is not intended to suggest dismissal of the Petition for Writ of Certiorari with

respect to Respondents Salt Lake County or the Salt Lake County Planning Commission.

DATED this 2nd day of October, 1990.

Walter R. Miller
Sandy City Attorney
Attorney for Petitioner

Leonard J. Lewis
Attorney for Respondents Chevron U.S.A. Inc. and Postero-Blecker, Inc.

Brinton R. Burbidge
Attorney for Respondents K. Delyn Yeates, R. Scott Priest, W. Scott Kjar, and Steven E. Smoot

ORDER

Based on the foregoing stipulated motion,

IT IS HEREBY ORDERED that the above-entitled Petition for Writ of Certiorari is dismissed with prejudice with respect to Respondents Chevron U.S.A. Inc., K. Delyn Yeates, R. Scott Priest, W. Scott Kjar, Steven E. Smoot, and Postero-Blecker, Inc., each such party to bear its or his own costs. The Petition for Writ of Certiorari

is not dismissed with respect to Respondents Salt Lake County and the Salt Lake County Planning Commission.

DATED this 2nd day of October, 1990.

~~Hon. Gordon R. Hall~~
~~Chief~~ Justice
Utah Supreme Court

CERTIFICATE OF MAILING

The undersigned hereby certifies that on this 2nd day of October, 1990, he caused to be mailed to:

Kent Lewis, Esq.
Attorney for the Defendants Salt Lake County and Salt Lake County Planning Commission
County Attorney's Office
2001 South State Street, #S 3600
Salt Lake City, Utah 84190-1200

a copy of the within and foregoing Stipulated Motion to Dismiss as between Sandy City and Respondents Chevron U.S.A. Inc., K. Delyn Yeates, R. Scott Priest, W. Scott Kjar, Steven E. Smoot, and Postero-Blecker, Inc.

Leonard J. Lewis

Daniel W. Anderson, A0080
Jodi Knobel Feuerhelm, A4570
Diane H. Banks, A4966
FABIAN & CLENDENIN,
A Professional Corporation
Twelfth Floor
215 South State Street
P. O. Box 510210
Salt Lake City, Utah 84151
Telephone: (801) 531-8900

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR

SALT LAKE COUNTY, STATE OF UTAH

SANDY CITY, A Municipal Corporation, Plaintiff, v. SALT LAKE COUNTY, A Political Subdivision of the State of Utah, SALT LAKE COUNTY PLANNING COMMISSION, McDONALD'S CORPORATION, and JOHN DOES 1-5, Defendants.	ORDER GRANTING MOTIONS TO DISMISS AND FOR SUMMARY JUDGMENT OF SALT LAKE COUNTY AND McDONALD'S CORPORATION AND McDONALD'S CORPORATION'S MOTION TO STRIKE, AND DENYING SANDY CITY'S CROSS MOTION FOR SUMMARY JUDGMENT Civil No. C88-03898 Judge J. Dennis Frederick

The hearing on McDonald's Corporation's Motion to Dismiss or in the Alternative for Summary Judgment; McDonald's Corporation's Amended Motion to Dismiss or in the Alternative for Summary Judgment; Salt Lake County's Motion for Summary Judgment; Sandy City's Cross Motion for Summary Judgment; and McDonald's Corporation's Motion to Strike Affidavit and Appraisal of Gary Free came before this Court on Monday, April 10, 1989 at 10:30 a.m. Jodi Knobel Feuerhelm and Diane H. Banks appeared on behalf

of McDonald's Corporation ("McDonald's"); Christopher Fuller and Walter Miller appeared on behalf of Sandy City ("Sandy"); and Kent Lewis appeared on behalf of Salt Lake County ("County"). The Court having reviewed the pleadings, affidavits, documents and exhibits filed by all parties on these matters, having heard the arguments of counsel, and otherwise being fully advised, hereby ORDERS, ADJUDGES AND DECREES as follows:

1. McDonald's Motion to Dismiss is granted on the ground that Sandy's action is untimely as a matter of law under the doctrine of laches.

2. Alternatively, McDonald's and the County's motions for summary judgment are granted on all of the claims asserted in Sandy's Verified Complaint filed herein.

3. Sandy's claim under Section 10-2-418 of the Utah Code ("Section 418") fails as a matter of law based on the undisputed facts in the record, in that:

a. the cost or value of land is not included in calculating cost projections under Section 418 of the Utah Code;

b. the cost of furnishings, equipment and fixtures is not included in calculating cost projections under Section 418 of the Utah Code;

c. the projected and actual costs of the McDonald's restaurant at issue are less than $750,000.00; and

d. Sandy City had not expressed a willingness to annex the property that is the subject of this

lawsuit at the time that the McDonald's permit application was approved.

4. As an alternative ground for granting McDonald's and the County's Motions for Summary Judgment, Sandy is collaterally estopped from relitigating the issues relating to its Section 418 claim, which were decided adversely to it in the litigation involving Chevron in Civil No. C87-07304.

5. McDonald's Motion to Strike the Affidavit and Appraisal of Gary Free is granted as to the portions of Gary Free's Affidavit and Appraisal relating to the cost of equipment and improvements to the real property. The Court finds that the Affidavit and Appraisal fail to comply with Rule 56(e) of the Utah Rules of Civil Procedure and Rule 703 of the Utah Rules of Evidence, in that the opinions contained therein are without foundation and are based on inadmissible hearsay. However, in ruling on the merits of the pending motions, the Court has considered and taken into account Mr. Free's Affidavit and Appraisal.

6. There are no disputes of fact with respect to Sandy's Title 57 Claim, Agency Claim, and Ordinance Claim (as those claims are identified in the Memorandum of Points and Authorities in Support of McDonald's Motion to Dismiss or in the

Alternative for Summary Judgment) and the County and McDonald's are entitled to judgment as a matter of law on those claims.

7. Sandy's Cross Motion for Summary Judgment against the County and McDonald's is denied.

8. Sandy's Verified Complaint is hereby dismissed with prejudice.

DATED this 24th day of April 1989.

BY THE COURT:

J. Dennis Frederick
Third Judicial District Court

CERTIFICATE OF SERVICE

I hereby certify that on this 14 day of April 1989, I caused a true and correct copy of the foregoing to be mailed, postage prepaid, to:

Walter R. Miller
Sandy City Attorney
440 East 8680 South
Sandy, Utah 84070

Kent Lewis
Salt Lake County Attorney
2001 South State Street, Suite S3600
Salt Lake City, Utah 84900-1200

Christopher C. Fuller
Durbano, Smith, Reeve & Fuller
4185 Harrison Boulevard, Suite 320
Ogden, Utah 84403

JKF:041189C